

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

NO. 20788 ✓

FRANCES T. HONG,)
)
)
Appellant,)
)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
)
Appellee.)
)

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

OPENING BRIEF FOR APPELLANT.

FILED

MAR 29 1966

WM. B. LUCK, CLERK

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JURISDICTION

This action was commenced in the United States District Court of Hawaii for the refund of excise taxes illegally and erroneously collected by the Appellee from the Appellant. The claims for refund were made pursuant to 26 U.S.C., Sec. 7422(a). Jurisdictional facts were alleged in paragraph 1 of the Complaint (Record of Proceedings - Page 2, hereinafter referred to as R-2). Jurisdiction of the United States District Court was conferred by 28 U.S.C. Sec. 1340 and 1346.

The action was tried by the court without a jury. The Findings of Fact and Conclusions of Law were filed on May 5, 1965 (R-). Judgment was entered on October 5, 1965 (R-). A Notice of Appeal was filed on November 30, 1965 (R-). Jurisdiction is conferred upon this Court by 8 U.S.C. Sec. 1291, 1294 and 2107.

STATEMENT OF THE CASE

Question involved. The sole issue in this case is whether an uli-uli, a dance instrument used by ancient Hawaiians, and now almost exclusively by hula dancers, and which is not ordinarily used in the rendition of musical compositions, is also a musical instrument subject to manufacturers' excise tax for sales made during the calendar years 1955 through 1960.

Manner in which raised. Appellant, during the years 1955 through 1960, manufactured and sold uli-ulis. The United States illegally and erroneously assessed and collected excise taxes on such sales on the grounds that uli-ulis were "musical instruments" for the purposes of the Sec. 4151 of the I.R.C., 1954 (R-6). Appellant filed timely claims for refund (R-6),

contending that they were not. After more than six months had elapsed from the filing of such claims, Appellant brought action to recover the axes paid (R-1).

SPECIFICATION OF ERRORS

I

THE COURT ERRED IN MAKING THE FOLLOWING FINDINGS OF MATERIAL FACTS:

1. That the instrument has been used in orchestral arrangements and has been used on commercially-sold phonograph records (R-).
2. That the uli-uli is "also regarded as a musical instrument by students and experts in the field of music" (R-).
3. That the uli-uli is similar in construction, character and use to maracas, except that maracas are more often used by members of a band or orchestra than by dancers (R-).
4. The uli-uli is suitable for, and is used in, performing musical compositions both written and unwritten and is suitable for use in, and is used in, instructing in music (R-).
5. That the uli-uli is a musical instrument utilized to provide rhythm, a basic component of music. Its adornment by colorful feathers, and even its use in the overwhelming majority of acts in public performances as part of the visual aspects of the hula or dance, do not change its character as a musical instrument (R-).

THE COURT ERRED IN MAKING THE FOLLOWING CONCLUSIONS
OF LAW:

6. Plaintiff, hereinafter referred to as Appellant, has failed to sustain her burden of showing that the uli-uli is not a musical instrument within the meaning of Treasury Regulations (R-).
7. The uli-uli is a musical instrument within the meaning of the statute and within the meaning of the Regulations (R-).
8. The Commissioner of Internal Revenue did not err in taxing as musical instruments the uli-ulis manufactured and sold by Appellant (R-).
9. Defendant, hereinafter referred to as Appellee, is entitled to judgment in its favor together with its cost of action (R-).

III

10. THE COURT ERRED FURTHER BY ADMITTING EVIDENCE SHOWING THAT THE ULI-ULI WAS A MUSICAL INSTRUMENT PRIOR TO 1955, DESPITE THE OBJECTION OF COUNSEL THAT THE EVIDENCE THAT WAS TO BE SUBMITTED RELATED TO MUSICAL INSTRUMENTS OF OLD HAWAII (Transcript of Proceedings - pages 81, 82, 85, 86, hereinafter referred to as T - 81, 82, 85, 86).

IV

11. THE COURT ERRED FURTHER BY FAILING TO EMPLOY THE TESTS SET FORTH IN SECTION 48.4151-1(d) OF THE MANUFACTURERS AND RETAILERS EXCISE TAX REGULATIONS AS TO WHETHER THE ULI-ULIS WERE NOVELTIES WHICH ARE UNSUITABLE FOR USE IN PLAYING MUSICAL COMPOSITIONS OR IN TEACHING MUSIC, IN DETERMINING

ARGUMENT OF THE CASE

SUMMARY

The arguments may be summarized as follows:

1. An uli-uli is a polished gourd partially filled with seeds, to which feathers are attached, and is used by hula dancers in the performance of their dances.
2. There is no evidence that it has been used in the rendition of a musical composition either in a public or private performance, except in one arrangement which called for bizarre sound effects.
3. The shaking of a uli-uli during the performance of a hula is no different from the banging of bamboo poles during the performance of the ini-cling.
4. The uli-uli differs from the maracas in a number of ways, the principal difference being that the maracas is used in the rendition of a musical composition, while the uli-uli is never (except for one atypical occasion) so used.
5. The criteria to follow in determining whether or not an article is a musical instrument have been stated in the last sentence of Treas. Regs. 8.4151-1(c), as the same was explained in Rev. Rul. 62-44.
6. The District Court erred in not using these criteria.

ARGUMENT

The uli-uli is a polished gourd which is partially filled with seeds and to which feathers are attached by means of raffia strands (T - 7, 8).

Most of them are sold in curio or gift shops and the rest in music stores (T - 10). It is used by hula dancers in the performance of their dances (T - 23). It is almost never used in the rendition of musical compositions. All of the witnesses for the Appellant testified that they had never seen an uli-uli used in the performance of a musical composition and all were unaware of the existence of any scores for the uli-uli.

Mr. William Hong, husband of the Appellant, and manufacturer of the uli-ulis, testified that he had never seen an uli-uli played and had "... only seen it in conjunction with a hula dance." (T - 13). Mr. Lloyd Krause, Bandmaster of the municipal Royal Hawaiian Band, with 26 years in the musical profession, (T - 21, 22) testified that he was not familiar with the uli-ulis as a musician, had seen them used by hula dancers but never by musicians, did not know of any musical scores in which they were used (T - 23), had never seen any one in a legitimate musical organization play them, had never conducted any arrangement in which they were used and had never heard of any musical composition or score in which they were used (T - 24).

Mr. Ray N. Tanaka, a dance orchestra leader, who had been active in music since 1937 (T - 33), and who, a licensed copyist, had transcribed about a thousand copies for various instrumental parts (T - 34), testified that he had seen uli-ulis used by dancers (T - 35, 36), but never by musicians, nor used in the rendition of a musical composition, and had never seen a score or an arrangement in which the uli-uli is used as a musical instrument (T - 36). Mr. Domenico Moro, a retired bandmaster of the Royal Hawaiian Band after having been with the band for over 14 years (T - 49)

and who had started his music career as a conductor at the age of 13 (T - 49), and was now 79 years of age (T - 50), also testified that uli-ulis are never used in the rendition of musical compositions (T - 51, 52), that he had never heard of an orchestra the musicians of which used uli-ulis and knew not of any musical compositions or scores in which the uli-uli is called for (T - 53).

The Appellee's witnesses consisted of one orchestra leader who specialized in bizarre and unorthodox "musical" instruments, an assistant anthropologist and students of music of ancient Hawaii. Mr. Martin Denny, on cross-examination, admitted that he had used an uli-uli in only one musical arrangement which he recorded (T - 68), that aside from that particular recorded arrangement, he had never used the uli-uli on any other musical compositions, recorded or unrecorded (T - 70). Mr. Denny further testified that some of his rhythmic instruments ran to the "quite bizarre" and that he had "gone to quite a number of extremes in producing sounds of a rhythmic nature", including use of an African thumb piano, the sound of crickets (T - 71), sounds of birds for which "there aren't any birds for" and that part of his performance consists of the "far-out and weird sounds" (T - 73). Although he has a number of imitators, he does not know of any other group which uses the uli-uli in the rendition of a musical composition (T - 74).

Mrs. Eleanor Williamson, Assistant in Anthropology at the Bishop Museum next testified on a study relating to the music of old Hawaii (T - 81). This was admitted in evidence despite objection by counsel for Appellant on the grounds that it related to what an uli-uli was in old Hawaii and not during the period 1955-1960: This witness also testified that the uli-uli was described as a musical instrument (T - 87) in certain books brought by her

o the witness stand. The titles of these books were: Ancient Hawaiian
Music, Hawaiian Life in the Pre-European Period, Unwritten Literature
of Hawaii, and Arts and Crafts of Hawaii. (T - 85, 86). The first book
mentioned contained scores for the uli-uli for old Hawaii, but testimony by
he witness was objected to by counsel for Appellant on the grounds that they
id not relate to the period from 1955 to 1960. The objection was also over-
uled by the Court (T - 87). It should be pointed out that this witness, ac-
ording to Appellee's counsel, was brought in as a student of anthropology
in charge of the project on music of old Hawaii and not as a witness on the
subject of "who uses uli-ulis today, or 1955 to 1960" (T - 92).

The next witness, Mrs. Dorothy Kahananui Gillett, an instructor in
music at the University of Hawaii (T - 93) testified that an uli-uli is a per-
cussive instrument of indefinite pitch (T - 99). She also referred to a work
by Sachs: Dictionary of Musical Instruments, which besides being a dic-
tionary of musical instruments was also a "poly-glossary, a multi-purpose
glossary for the entire field of musical instruments" (T - 105). However,
she also testified that a puili (a bamboo split on one end which is struck by
dancers) would also be classified a musical instrument (T - 109, 110). She
urther testified that a dog's-tooth anklet would also be classified by Sachs
as a musical instrument (T - 112, 113). She would place the anklet under
the category of rattles. (T - 114). She would also place the uli-uli under
the classification of uli-ulis as musical instruments when the bamboo poles
are banged together by dancers in the Filipino dance known as "tini-cling"
(T - 114). Mrs. Gillett, being the expert that she is in ancient Hawaiian
music, nevertheless was not familiar with any musical composition or score

one in Hawaii which included a score for the uli-uli (T - 100). She has heard the uli-uli used with a dance and once with a group of children who recorded a chant using the uli-ulis (T - 108). Other than that, she had never heard them used (T - 108, 109).

Mrs. Edwina K. Mahoe, who was employed "as a hula instructor and music" with the Department of Parks and Recreation (T - 117) testified at other than the one musical composition found in Appellee's Exhibit "A", she knew of no other written musical composition in the world which called for use of an uli-uli (T - 124). Further, she knew of no unwritten compositions in which the uli-uli is used where a hula dance is not being performed by the person using the uli-uli (T - 125).

The last witness to appear, Mrs. Saneta Richards, a graduate student in the field of ethnomusicology (T - 128) testified that besides the one instance in Appellee's Exhibit "A" and the notations for uli-uli in the book, Ancient Hawaiian Music, previously referred to by Mrs. Williamson, she knew of no other composition that requires use of the uli-uli (T - 132). She further testified that she had never heard these scores played since she was not familiar enough with the entire literature to tell whether she did or not (T - 133).

Of all the witnesses, only one, Mr. Denny, testified that he had recorded a musical arrangement using an uli-uli (T - 68), and that aside from this one arrangement, he had never used it on any other musical composition, recorded or unrecorded, and did not know of any other group which used the uli-uli in the rendition of a musical composition (T - 74).

All other witnesses denied ever hearing the uli-uli in recorded form or

used in any orchestral arrangement. The Court, therefore, erred in finding as material fact that "the instrument has been used in orchestral arrangements and has been used on commercially-sold phonograph records" (R-).

The Court also erred in finding that "the uli-uli is similar in construction, character and use to maracas, except that maracas are more often used by members of a band or orchestra than by dancers". In the first place, there is no similarity in construction, character or use of the instruments. In the second place, the maracas are used exclusively by members of a band or orchestra while the uli-uli is used exclusively by the dancers. There is no question here of dual use of either instrument both rendition of musical compositions and dancing. Mr. Krause testified that he had never seen maracas used by dancers (T - 27). Neither Mrs. Richards (T - 131). Mr. Krause has seen dancers use the uli-uli but never by a musician (T - 23). Mr. Tanaka testified to the same fact (T - 35, 36). So did Mr. Moro (T - 51, 52, 53). In fact, no one testified that the uli-uli was used in the rendition of any musical composition during any period after 1954, except Mr. Denny, when he had one musical arrangement recorded (T - 68). And Mrs. Gillett, when she had a group of children record a chant (query, whether this is a musical composition) (T - 108).

The Court erred further in finding that the uli-uli "is also regarded as a musical instrument by students and experts in the field of music". None of the witnesses had ever seen the uli-uli used as a musical instrument except Mr. Denny, who had employed it on one occasion.

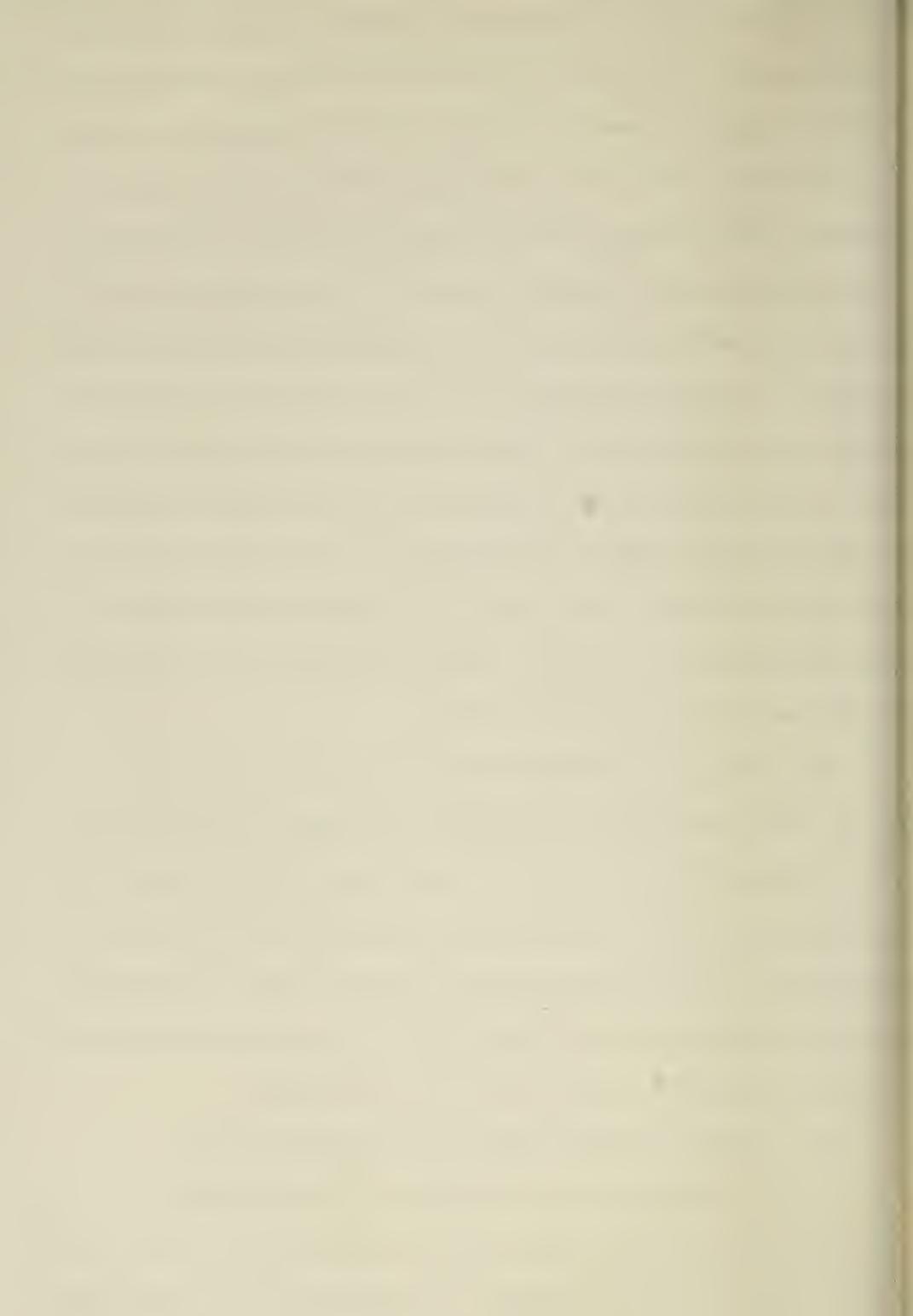
... to similarity in "construction, character and use" of the uli-uli and the maracas; The maracas, as has been pointed out, is used by members of the orchestra; never by dancers. It is vice versa with the uli-uli. There are hundreds of musical compositions which call for use of the maracas (T - 25). There is virtually none for the uli-uli. The maracas has tapered handles and is used by a musician in an up-and-down movement. The uli-uli is used by a hula dancer in a sidewise movement or a pounding movement. By attaching feathers to an uli-uli, which is an essential part hereof for visual aspects of the dance, it would be inconvenient for a musician to use an uli-uli in place of maracas for the up-and-down movement, and, in fact, the uli-uli has never been used by any musician in place of maracas, or vice versa. The uli-uli must be constructed so that it will withstand pounding by the dancer. Further, the maracas is a more articulate instrument than the uli-uli (T - 131).

The Court erred in finding that "the uli-uli is suitable for, and is used in, performing musical compositions both written and unwritten and suitable for use in, and is used in, instructing in music". It has been shown above that musical compositions for the uli-uli, as well as the reasoning thereon, is virtually non-existent. The latter part of the statement at declares that the uli-uli is suitable for use in, and is used in, instructing in music is probably based on two lines of testimony:

Q Is this instrument suitable for instructing in music?

A It is essential if you are thinking of Hawaiian music. (T - 106).

No evidence was adduced as to how the uli-uli can be used in the instruction of music, either in theory or practice. It is impossible to conceive of how



uli-uli, a instrument used solely by a hula dancer, virtually never by musician, for while no scores (except of perhaps one or two instances) have been written, can be deemed suitable for instructing in music.

The Court erred in finding that "the uli-uli is a musical instrument used to provide rhythm, a basic component of music. The adornment colorful feathers, and even its use in the overwhelming majority of acts public performance as part of the visual aspects of the hula or dance, do not change its character as a musical instrument." The uli-uli may be classified as a musical instrument in the same manner as the dog's-tooth, the split bamboo sticks (puilli) or bamboo poles sawed in the proper lengths for use in the Filipino uli-uli-dance. To say that the uli-uli is used in the "overwhelming majority of acts in public performance as part of the visual aspects of the dance" is an understatement. It has never been used in a public performance other than in a dance. To put it conversely, has never been used in a public performance in the rendition of a musical composition.

The Court erred in making the conclusions of law enumerated under specification of errors above. In essence, these conclusions of law hold that the uli-uli is a musical instrument within the meaning of Treasury regulations 40.4131-1(e). The last sentence of the cited Regulations states:

The term "musical instruments" does not include articles in the nature of toys or novelties which simulate musical instruments and which are unsuitable for use in playing musical compositions or in teaching music.

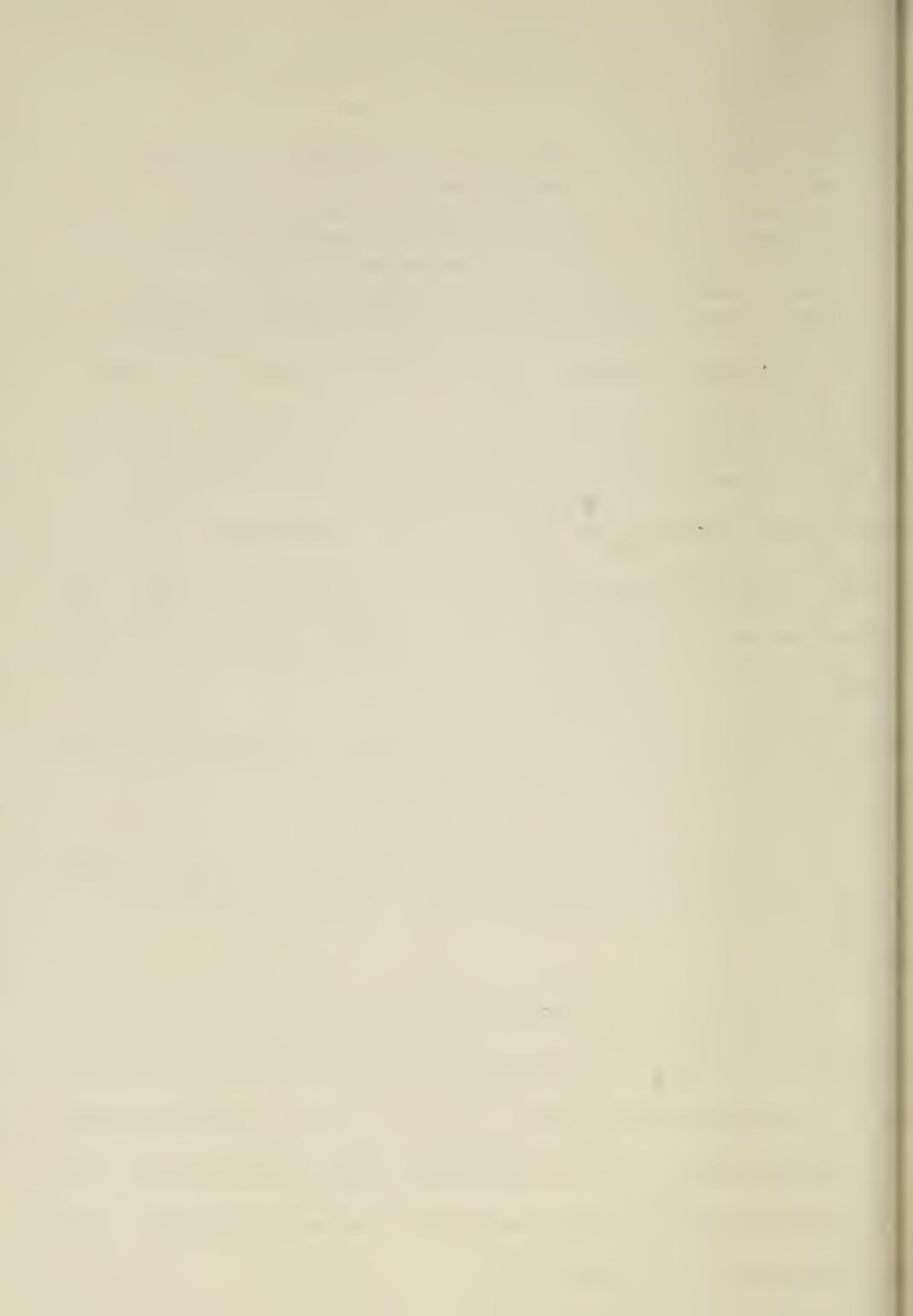
The pertinent regulation is discussed in Rev. Rul. 62-44. Rev. Rul. 62-44 states in part:

Musical instrument, consideration is given to a variety of factors. Among them are the primary purpose for which the article is designed; the quality of construction of the article; whether it is a type ordinarily used in the rendition of musical instruments, either in solo presentation or in connection with other musical instruments, or whether it is adaptable for teaching proficiency in the use of musical instruments. In considering the last two factors it is not essential that the article used in musical rendition or instruction be of a professional standard of quality. The aforementioned factors are not all inclusive, and no one of them is determinative of the taxability of a particular article.

The primary purpose for which the uli-uli has been used since before 1955 is that of an article of dance. It is virtually never used (except in one unusual case) in the rendition of any musical composition, either in solo presentation or with other musical instruments. It is not adaptable for teaching proficiency in the use of musical instruments, and the Court has not so found. What the Court did find was that the uli-uli is suitable for use in, and is used in, instructing in music," a finding not supported by the evidence. The uli-uli is certainly not adaptable for teaching proficiency in the use of anything but the uli-uli.

The Court did not employ the above criteria in arriving at its decision that the uli-uli is a musical instrument. Instead it relied on the following:

1. Congress adopts legislation previously in existence and the interpretation placed by the Government previously is presumably adopted (L-140). Appellant does not deny this; to the contrary, Appellant agrees that the Government is correct in exempting certain articles from the category of "musical instruments" when they are not such instruments, except the broadest possible category.



2. The primary purpose of Congress is to get revenue. Under this construction, it is not necessary to determine whether an article is really a "musical instrument". This was given prime consideration by the Court, as evidenced by the comment: "That is the only thing that is outstanding there, to me," (T - 140).

3. The historical background of the uli-uli showed that the article was used in ancient Hawaii to provide rhythm for the purpose of dancing.

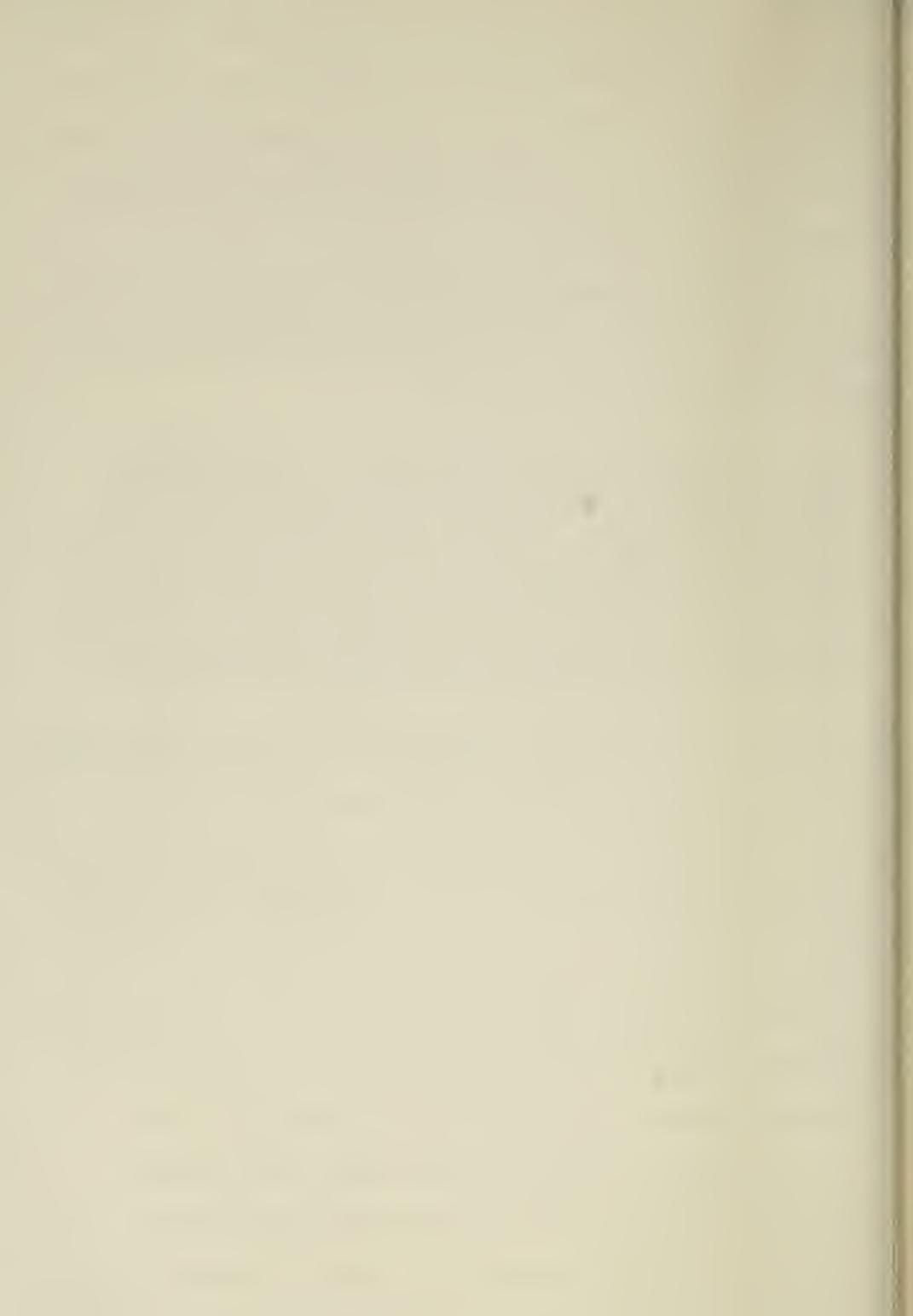
In arriving at its decision, the Court stated:

In the light of the historical origin of the instrument in this case involved and other testimony which seems to indicate and which does indicate that it was used by Hawaiians from very early times to produce rhythm for the purpose of dancing, and to produce it, sometimes, not necessarily by the dancers themselves, although I am not sure that that is an absolutely valid distinction; plus the other testimony which has been given here; plus the demonstrations made; I can't help but feel that this is a musical instrument; that it falls on the musical instrument side, although it is one of those close-to-the-border-line questions. (T - 141).

Evidence of the use of the uli-uli in old Hawaii should not have been admitted because it does not relate to the period 1955 through 1960, the taxable years in question. Even if such were admissible, the evidence does not show that the uli-uli was ever used, except on one or two occasions, in the rendition of a musical composition. The Court even acknowledged the fact that the uli-uli has fallen into disuse as a musical instrument (T - 140). The Court stated that even though instruments become obsolete or are not made any more "doesn't make them any less musical instruments" (T - 142).

4. The broad classification approach of a musical instrument.

That the Court relied on this test is supported by the findings that not only is the uli-uli recognized as a "musical instrument" in "recognized historical



works on the musical instruments of old Hawaii, but also in a German dictionary considered as the leading authority in the field of musical instruments; that the *uli-uli* is defined as a percussive instrument of indefinite pitch. Under this broad classification, not only maracas and castanets are included, but dog's-tooth anklets, split bamboo sticks and bamboo poles (T - 114).

5. The Court used the playing of pipes by people who are dancing as an analogy. The Court stated: "Certainly if people who played the pipes and danced while playing the pipes, we wouldn't consider that the pipes were not a musical instrument just because the players danced around while they were playing". (T - 141). We come back to the question of dual use here. If a pipe, or a castanet for that matter, is ordinarily used in the rendition of a musical composition, and is also used by a dancer, the mere fact that a dancer uses them, of course, does not make the pipe or the castanet any less a musical instrument. However, where two bamboo poles are banged together in a Filipino dance both as a visual aspect of the dance and to create rhythm, would they be classified as musical instruments even though they produce sound, perhaps a "very distinctive rhythm" and such rhythm creates an "effect that is musical" and to that extent "satisfies the requirement of music"? (Quotations from the opinion of the Court, T - 143). So it is with the *uli-uli*. The bamboo poles, the *uli-uli*, the split bamboo sticks (*pali*), the dog's-tooth anklet--none of these are used in the rendition of a musical composition. The fact that they are used in dances does not convert them into musical instruments. The pipes and castanets are used both in the rendition of musical compositions and in dances; they are dual-purpose

1. The Court in *State v. Hiram L. Cunanan*, 1936, 70 Hawaii 141, had the responsibility of upholding the constitutionality of the ban on the musical instruments of the people over and made it the state would regard as such". (T - 144). This approach, of course, ignores the tests laid down in the regulations.

7. The Court in 1886, noting that the *ukulele* is said "to be used as a musical instrument", stated that it is "to be used in creating the rhythm of the dancers themselves. They can sing their own song and do their own dance, if they want to." Tourists buy them and "they take it home to use along with the hula to create their own rhythm while they are dancing. In creating their own rhythm, they are creating part of the musical portion as part of the music or the music, which they are going to perform the hula." (T - 145). Again, the test is whether the *ukulele* is to be used in the rende-

tion of a musical composition, not as to whether the *ukulele* will provide the rhythmic portion by when the tourist is going to perform the hula.

CONCLUSION

The issue of whether the *ukulele*, an article used exclusively by a dancer as part of her dance, not normally used in the rendition of a musical composition and unsuited for teaching proficiency in the use of musical instruments, even though the same may be classified as a "musical instrument" in old Hawaii, and defined as such by a musical dictionary, which dictionary according to an expert could include dog's-tooth andlets, wills a bamboo pole under the same classification, should, for all

